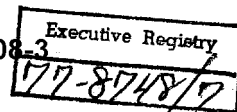


26 October 1977



U. 2. 2

MEMORANDUM FOR: Director of Central Intelligence

FROM: Anthony A. Lapham
General Counsel

SUBJECT: Proposed DCI Directive on NFIP Procurement Policy

REFERENCES: (a) Your Memo to the Acting D/DCI/IC, dtd 1 September
(b) Memo to You fr the Acting D/DCI/IC, dtd 13 September
(c) Your Handwritten Note to Me, dtd 17 September,
commenting on reference (b)

1. Action Requested: None; for information only.

2. Background: The proposed DCI directive on NFIP Procurement Policy provides, among other things, that:

Within the framework of applicable Armed Services and Federal Procurement Regulations, and consistent with statutory responsibility to protect sensitive intelligence sources and methods, Agency Heads, Program Managers, and the heads of elements of departments and agencies within the Intelligence Community constituting the NFIP shall:

- ensure competitive involvement to the maximum extent possible in all procurement activities;
- broaden the scope of procurement actions and increase the number of qualified sources from which to solicit and accept bids, proposals, or quotations; and
- review criteria for designating responsible prospective contractors to broaden the base of U. S. firms supporting the NFIP.

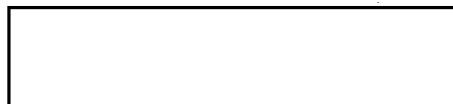
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In reference (a), you asked the Acting D/DCI/IC whether, in regard to the proposed policy, we can "go so far as to say that in competitive procurements a new contractor, or a contractor with a very small percentage of the total buy, should be given some competitive edge, e.g., an offset of 5% on a price advantage." You remarked that absent some such additional provision, the proposed directive would have "absolutely no teeth." In reference (b) the Acting D/DCI/IC reported to you his conclusion that such an additional provision would be contrary to law, and in reference (c) you asked me to review that conclusion, noting other contexts (procurements of goods or services from small or minority-controlled businesses) in which preferential treatment of certain contractors is permissible.

3. As I understand it, the desired objective is to expand the number of firms that compete for NFIP business so that, presumably, the competition for that business will become more vigorous, thus freeing NFIP program managers from dependence on too few qualified contractors and promoting over the long run greater efficiency and lower cost in the performance of NFIP contracts. The question as I see it is whether, at least over the short run and in order to achieve the ultimate objective, a price advantage or some other competitive preference may lawfully be given to certain contractors (not necessarily socially or economically disadvantaged or otherwise entitled to special consideration) in order to induce their participation in NFIP procurement actions. I have found no authority for such a practice and therefore must side with the conclusion reached by the Acting D/DCI/IC in reference (b).

4. There are a good many exceptions to the so-called rule of competitive fairness, requiring in general equal treatment of those who seek government contracts, but each of these exceptions has specific legislative sanction. So, for example, the advantages and preferences enjoyed by small business and minority-controlled business stem from the provisions of the Small Business Act and the regulations implementing that statute. [I have in rough form, and will put into more polished form if you want to see it, a memorandum describing the central provisions of the Small Business Act and associated procurement regulations.] There are other statutes that likewise mandate or authorize a departure from the norm of even-handed treatment and that in one way or another restrict open competition for government contracts, or create favored classes of competitors. But quite simply there is no enactment that allows a price advantage or other comparable competitive edge to be given to some set of contractors to encourage their participation in procurement actions, solely for the purpose of broadening the commercial or industrial base of support for a particular government program, without regard to other circumstances entitling those contractors to favored status.

5. This advice should have come to you sooner, but we went down some research roads that turned out to be blind alleys.



Anthony A. Lapham

STAT

cc: Acting DDCI
Acting D/DCI/IC

OGC: AAL: sin
Original - Addressee
1 - ER via Ex Secty
1 - OGC

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